

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 182

Docket No. CB-1208-10-0020-U-1

**Special Counsel
ex rel. Maria Aran,
Petitioner,**

v.

**Department of Homeland Security,
Agency.**

September 2, 2010

Anne M. Gullick, Esquire, Dallas, Texas, for the petitioner.

Daniel N. Vara, Jr., Esquire, Coral Springs, Florida, for the petitioner.

Peter Gregory, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman

OPINION AND ORDER

¶1 Pursuant to [5 U.S.C. § 1214](#)(b)(1)(A), the Office of Special Counsel (OSC) requests a 45-day stay of the agency's reassignment of Maria Aran while OSC completes its investigation, continues settlement negotiations, and determines what further action is warranted. For the reasons set forth below, OSC's request is GRANTED.

BACKGROUND

¶2 In its August 30, 2010 stay request, OSC alleges that Ms. Aran is currently the Chief of Staff, U.S. Citizenship & Immigration Services (USCIS), located in District 9, Miami, Florida. OSC further alleges that in June 2009, Ms. Aran became aware of substantial immigration irregularities occurring in USCIS District 9's Oakland Park Field Office. Specifically, she learned that over 600 certificates of citizenship and naturalization were voided without due cause, were unaccounted for, had not been verified as issued, were issued as duplicate certificates, were unrecorded such that it was impossible to later identify counterfeit certificates, and were routinely left unsecured.¹ On June 19, 2009, Ms. Aran sent an e-mail to the USCIS Office of Security and Integrity (OSI) alleging gross negligence and mishandling of these certificates. However, she mistakenly sent a copy of this e-mail to 300 OSI agents nationwide. One such agent forwarded a copy of Ms. Aran's e-mail to her supervisor, Linda Swacina, District Director, District 9.

¶3 When Ms. Swacina received a copy of Aran's allegations concerning District 9's mishandling of certificates, she e-mailed Ms. Aran and questioned her about her decision to report these allegations to OSI. Ms. Swacina also forwarded Ms. Aran's e-mail to several other employees implicated in Ms. Aran's allegations. Several days later, Ms. Swacina confronted Ms. Aran during a staff meeting and asked her to explain her actions. Ms. Swacina also met individually with Ms. Aran and criticized her decision to communicate with OSI directly.

¶4 Shortly after receiving Ms. Aran's allegations in June 2009, OSI began an investigation, and, on November 13, 2009, compiled its 24-page Report of

¹ The facts set forth in this section of the Board's Opinion and Order are those alleged by OSC's counsel in its request for a stay. They are supported by a declaration she has prepared in which she states that she is familiar with the attendant facts and circumstances that form the basis for OSC's request for a stay, and that, based on her personal review of Ms. Aran's allegations, the summary of evidentiary support fairly and accurately summarizes the evidence to date.

Investigation (ROI) which documented numerous problem areas and lapses in the handling of certificates. Acting Southeast Regional Director Rosemary Melville, Ms. Aran's second-line supervisor at that time, drafted management's March 5, 2010 response to the OSI ROI.

¶5 In January 2010, a vacancy announcement was issued for a Supervisory Adjudications Officer position in Tampa, Florida. After the vacancy announcement closed, a certificate of eligibles was compiled, and Tampa management acknowledged that there were numerous qualified candidates to consider. However, in February 2010, Ms. Melville contacted Human Resources and halted the recruitment action. By letter dated February 9, 2010, she notified Ms. Aran that she was being reassigned from her position as Chief of Staff in Miami to the vacant Supervisory Adjudications Officer position in Tampa, effective March 15, 2010. The letter advised Ms. Aran that she had 10 days to accept the directed reassignment and that failure to do so would serve as grounds for her removal.²

¶6 OSC contends that a stay of Ms. Aran's reassignment is appropriate while it completes its investigation because, based on the evidence that it has gathered to date, there are reasonable grounds on which to believe that Ms. Aran's reassignment is a result of her protected activity and is therefore prohibited under [5 U.S.C. § 2302\(b\)\(8\)](#).

ANALYSIS

¶7 OSC asserts that a prima facie violation of [5 U.S.C. § 2302\(b\)\(8\)](#) exists where: (1) The employee made a protected disclosure; (2) the official(s) who recommended or took the personnel action had actual or constructive knowledge of the protected disclosure; (3) a personnel action was threatened or taken; and

² OSC and USCIS informally agreed to stay the directed reassignment until September 7, 2010.

(4) the protected disclosure was a contributing factor in the personnel action. *See Office of Special Counsel ex rel. Hopkins v. Department of Transportation*, [90 M.S.P.R. 154](#), ¶ 4 (2001). OSC further asserts that prima facie evidence supports each of these four elements.

¶8 First, OSC claims that Ms. Aran engaged in activity covered by § 2302(b)(8) when she disclosed to OSI multiple certificate irregularities by USCIS, whose mission is to provide accurate and useful information to customers, granting immigration and citizenship benefits and ensuring the integrity of the immigration system. OSC claims that Ms. Aran's disclosures were protected because a disinterested observer would have a reasonable basis to believe that they evidenced gross mismanagement and a danger to public health and safety. Second, OSC contends that Ms. Swacina knew about Ms. Aran's protected activity because, when Ms. Swacina questioned Ms. Aran about going directly to OSI, she (Ms. Swacina) attached a copy of Ms. Aran's e-mail. In addition, OSC contends that Ms. Melville knew about Ms. Aran's protected activity because she was tasked with drafting management's response to OSI's ROI, which strongly implied that Ms. Aran was the one who made the complaint that resulted in the investigation. Third, OSC states that a reassignment is a "covered" personnel action under [5 U.S.C. § 2302\(a\)\(2\)\(A\)\(iv\)](#). Fourth and finally, OSC contends that Ms. Aran's protected activity was a contributing factor in the agency's decision to reassign her, particularly given Ms. Swacina's questioning her via e-mail about her decision to go to OSI, questioning her about her disclosures in front of other employees at a staff meeting, and meeting with her individually to ascertain why she did not communicate with Ms. Swacina directly before going to OSI. OSC further contends that while Ms. Melville was working on management's response to Ms. Aran's allegations, she (Ms. Melville) directed Human Resources to cease processing a vacancy announcement for the Supervisory Adjudications Officer position and, despite the availability of numerous qualified candidates, ordered Ms. Aran's directed reassignment.

¶9 Under [5 U.S.C. § 1214\(b\)\(1\)\(A\)\(i\)](#), OSC “may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the [OSC] determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.” Such a request “shall” be granted, “unless the [Board] member determines that, under the facts and circumstances involved, such a stay would not be appropriate.” [5 U.S.C. § 1214\(b\)\(1\)\(A\)\(ii\)](#). OSC’s stay request need merely fall within the “range of rationality” to be granted, *In re Kass*, [2 M.S.P.R. 79](#), 96 (1980) (interpreting the predecessor provision to [5 U.S.C. § 1214](#), [5 U.S.C. § 1208](#)), and the facts must be reviewed in the light which is most favorable to a finding of reasonable grounds to believe that a prohibited personnel practice was (or will be) committed. *Special Counsel v. Department of Transportation*, [59 M.S.P.R. 552](#), 555 (1993).

¶10 Given the assertions made by OSC in its stay request, I find that there are reasonable grounds to believe that the agency decided to reassign Ms. Aran because of her protected disclosures under [5 U.S.C. § 2302\(b\)\(8\)](#).

ORDER

¶11 Based on the foregoing, I conclude that granting OSC’s stay request would be appropriate. Accordingly, a 45-day stay of Ms. Aran’s reassignment is hereby GRANTED. The stay shall be in effect from September 7, 2010, through and including October 22, 2010. It is further ORDERED that:

(1) All actions of the Department of Homeland Security to effect Ms. Aran’s reassignment are hereby stayed;

(2) During the pendency of this stay, Ms. Aran shall remain in her position and perform regular duties as Chief of Staff, USCIS, District 9, Miami, Florida;

(3) The Department of Homeland Security shall not effect any change in Ms. Aran’s duties or responsibilities which is inconsistent with her salary or

grade level, or impose upon her any requirement which is not required of other employees of comparable position, salary, or grade level;

(4) Within 5 working days of this Order, the agency shall submit evidence to the Clerk of the Board showing that it has complied with this Order;

(5) Any request for an extension of the stay pursuant to [5 U.S.C. § 1214](#)(b)(1)(B) must be received by the Clerk of the Board and the agency, together with any evidentiary support, on or before October 7, 2010. Any comments on such a request that the agency wants the Board to consider pursuant to [5 U.S.C. § 1214](#)(b)(1)(C) must be received by the Clerk of the Board, together with any evidentiary support, on or before October 14, 2010.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.